85-1921

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1985

DIANE L. MAURIELLO,

Petitioner,

vs.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO diMAYORCA, M.D., individuaily and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., jointly and severally,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether under this Court's decision in *Regents of the University of Michigan v. Ewing,* 54 U.S.L.W. 4055 (Dec. 12, 1985), the jury may determine that the dismissal of a doctoral student by a state-supported university was not a "genuinely academic decision" where the record contains evidence both that faculty evaluations of the student occurred and that the dismissal was not based on those evaluations or on the student's academic performance?

2. Whether under this Court's decision in *Board of Curators of the University of Missouri v. Horowitz,* 435 U.S. 78 (1978), the jury may determine that procedural due process was not given to a doctoral student dismissed by a state-supported university where the student's academic performance never was informally evaluated by the university committee dismissing the student but was informally evaluated by a faculty member who did not dismiss the student, made no recommendation as to the student's dismissal, had no authority to dismiss the student and was not a member of the committee which dismissed the student?

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No.

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DIANE L. MAURIELLO,

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THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO diMAYORCA, M.D., individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., jointly and severally,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The judgment of the United States District Court for the District of New Jersey entered in petitioner's favor after the jury duly rendered its verdict is set forth in the judgment entered on the docket August 13, 1984. The District Court's opinion concerning respondents' post-trial motions, including denying judgment notwithstanding verdict, is unreported. The District Court's rulings on respondents' post-trial motions are set forth in the order entered on the docket August 28, 1984. The opinion of the United States Court of Appeals for the Third Circuit vacating the judgment of the District Court and entering judgment in respondents' favor is reported at 781 F.2d 46 (3d Cir. 1986). The Court of Appeals denied rehearing en banc by order dated February 18, 1986.

The judgment and order of the District Court, the opinion of the Court of Appeals and the order of the Court of Appeals denying rehearing en banc appear in the Appendix, *infra*.

STATEMENT OF JURISDICTION

On January 14, 1986, the Court of Appeals entered judgment vacating the judgment of the District Court and entering judgment in respondents' favor (23a). Petitioner filed a timely petition for rehearing en banc on January 28, 1986. On February 18, 1986, the Court of Appeals denied the petition for rehearing en banc (24a to 25a). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions pertain to this case:

(1) The Fourteenth Amendment to the Constitution of the United States, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, Diane Mauriello, matriculated for her Ph.D. degree in microbiology for five and one-half years in the Graduate School of Biomedical Sciences at respondent, The University of Medicine & Dentistry of New Jersey. On February 4, 1983, Ms. Mauriello was dismissed from the Ph.D. program by decision of the Graduate Committee of the Department of Microbiology (the "Graduate Committee") without any reason being given and without any evaluation by the Graduate Committee of Ms.

Mauriello's academic record or the quality of her doctoral thesis research. At the time of her dismissal, Ms. Mauriello was a B+ student who never had been placed on academic probation.

Ms. Mauriello sued respondents in the United States District Court for the District of New Jersey pursuant to 28 U.S.C. §§ 1331 and 1343. Ms. Mauriello sought relief under the Constitution of the United States and 42 U.S.C. § 1983 for her arbitrary and capricious dismissal from the Ph.D. program in violation of her procedural and substantive due process rights. Ms. Mauriello alleged that respondents dismissed her without evaluating her academic performance, without giving her notice that her dismissal was being considered and without her discussing her academic performance with the Graduate Committee which dismissed her.

During the jury trial, the Honorable Frederick B. Lacey ruled as a matter of law that Ms. Mauriello's dismissal was for academic reasons and not disciplinary ones. Although ruling that Ms. Mauriello's dismissal was "academic," Judge Lacey submitted the following questions to the jury on special interrogatories:

> (i) whether respondents did not give Ms. Mauriello procedural due process in connection with her dismissal;
>
> (ii) whether Ms. Mauriello proved that her academic performance was not evaluated prior to her being dismissed; and
>
> (iii) whether Ms. Mauriello proved that her dismissal from the Ph.D. program was arbitrary and capricious.

The jury answered "yes" to each of the special interrogatories and awarded $50,015 in damages to Ms. Mauriello (26a).

Respondents filed post-trial motions to vacate the judgment; for judgment notwithstanding verdict; for a new trial; for dismissal of the complaint pursuant to the Eleventh Amendment; and for a stay pending appeal. Following oral argument, the District Court denied all post-trial motions except granted respondents' motion for a new trial unless Ms. Mauriello consented to remit the amount of $40,000 (3a to 4a, 9a). On August 31, 1984, Ms. Mauriello filed a consent to remit the judgment to $10,015. On August 28, 1984 the District Court entered an order on respondents' post-trial motions and granted injunctive relief to Ms. Mauriello reinstating her into the Ph.D. program under certain conditions (2a to 9a).

Respondents appealed from the District Court's judgment entered on the docket on August 13, 1984 and from the District Court's order entered on the docket August 28, 1984.

On appeal, the United States Court of Appeals for the Third Circuit vacated the judgment of the District Court and entered judgment for respondents. 781 F.2d at 52 (10a-23a). The Court of Appeals held that the District Court erred in submitting to the jury the factual issues of whether respondents' actions were arbitrary or capricious, whether there was a rational basis for Ms. Mauriello's dismissal based on the quality of her work and whether Ms. Mauriello's dismissal was motivated by bad faith or ill-will unrelated to her academic performance. 781 F.2d at 51 (19a). The Court of Appeals held that in view of evidence in the record of evaluations of Ms. Mauriello by her former faculty advisor, there were no factual issues to submit to the jury as it could not be said that Ms. Mauriello's dismissal was "beyond the pale of reasoned academic decision-making." 781 F.2d at 52 (22a).

REASONS FOR GRANTING THE WRIT

This case falls within the "narrow avenue for judicial review" left open by *Regents of the University of Michigan v. Ewing*, ____ U.S. ____, 54 U.S.L.W. 4055, 4058 (Dec. 12, 1985). By vacating the jury's findings that respondents violated Ms. Mauriello's procedural and substantive due process rights in dismissing her from the Ph.D. program, the Court of Appeals removed from the jury the opportunity to determine whether Ms. Mauriello's dismissal was a "pretextual attempt" to disguise unlawful conduct or was not "genuine" academic decisionmaking. Thus, the issue on which this Court should grant this Petition is to guide the lower courts on how one proves if an academic decision was "genuine" or not.

The opinion of the Court of Appeals denies a dismissed student the opportunity to demonstrate that faculty evaluations of the student were not the basis for dismissal or are not worthy of belief. Under the opinion of the Court of Appeals, a university may defeat challenges to its decisionmaking merely by offering evidence that faculty evaluations of the student occurred. Thus, a disputed issue of "genuine" academic decisionmaking is determined solely by the nature of the university's proofs and not by the trier of fact.

If the issue of constitutionally impermissible academic dismissals may not be raised even on a proper evidentiary foundation, then academic decisionmaking itself becomes flawed and standardless, subjecting the decisionmaking process to abuse, misuse and personal vendettas. *See, e.g., Connelly v. University of Vermont & State Agricultural College*, 244 F. Supp. 156 (D. Vt. 1965) (dismissed medical student's allegation that a professor's predetermination not to give him a passing grade regardless of the quality of his work during a make-up period stated a claim for arbitrary and capricious dismissal).

During jury trial, the District Court ruled that Ms. Mauriello's dismissal was for academic reasons as opposed to disciplinary ones. Nonetheless, the District Court asked the jury, as the trier of fact, to answer special interrogatories designed to determine whether respondents' decision to dismiss Ms. Mauriello was a "genuinely academic decision" — that is, was it made "conscientiously and with careful deliberation based on an evaluation of the entirety" of Ms. Mauriello's academic career. *Ewing, 54 U.S.L.W. at 4058; see Board of Curators, Univ. of Missouri v. Horowitz,* 435 U.S. 78, 89-90 (1978).

Based on the jury's verdict, Ms. Mauriello's dismissal was "such a substantial departure from accepted academic norms as to demonstrate that the . . . committee responsible did not actually exercise professional judgment." *Ewing,* 54 U.S.L.W. at 4058. The jury found that Ms. Mauriello was denied procedural due process, that she did not have her academic performance evaluated prior to her dismissal and that she proved that her dismissal was arbitrary and capricious (26a). Thus, the jury did not believe respondents' evidence that Ms. Mauriello's dismissal resulted from evaluations of her academic career.

Despite the jury's verdict, the Court of Appeals held that because evaluations of Ms. Mauriello were contained in the trial record, the jury could not have determined that Ms. Mauriello's dismissal was not "genuinely" academic. By its holding, the Court of Appeals barred inquiry into whether Ms. Mauriello's dismissal legitimately was determined on academic grounds, thereby disregarding an uncontested fact that no member of the Graduate Committee which dismissed Ms. Mauriello ever academically evaluated her.

On her case in chief, Ms. Mauriello introduced into evidence respondents' admissions that she was dismissed because she did not then have a faculty advisor and that she did not present

evidence that she had done research which could form the basis of an acceptable thesis. Neither of these reasons were judgments as to Ms. Mauriello's academic performance and each of these reasons was contradicted by Ms. Mauriello's evidence. With regard to Ms. Mauriello not then having a faculty advisor, Ms. Mauriello and the Graduate Committee met for the purpose of assigning a new faculty advisor to Ms. Mauriello. With regard to not presenting her thesis research, at two meetings with the Graduate Committee Ms. Mauriello was stopped before she could present her thesis research and she was dismissed before receiving, as promised by respondents, written notice of what research data to present at a third meeting.

It was uncontested at trial that before dismissing Ms. Mauriello the Graduate Committee neither evaluated her scholastic performance nor her academic record — a record which, unlike either Mr. Ewing's or Ms. Horowitz's, was not "unenviable" or "unfortunate", but rather a B+. Furthermore, unlike Mr. Ewing or Ms. Horowitz, Ms. Mauriello never was placed on academic probation.

On respondents' case at trial, respondents introduced evidence of academic evaluations of Ms. Mauriello by Ms. Mauriello's former faculty advisor. However, it is uncontroverted that Ms. Mauriello's former faculty advisor did not dismiss Ms. Mauriello, did not recommend that Ms. Mauriello be dismissed and did not advise anyone that Ms. Mauriello was not suitable for a Ph.D. degree. Moreover, Ms. Mauriello's evidence obtained in cross-examination demonstrated that the evaluations of her had no effect. Indeed, after hearing of these evaluations, the Graduate Committee did not dismiss Ms. Mauriello but, instead, considered finding a new faculty advisor for her. By such evidence, Ms. Mauriello placed in dispute the material facts surrounding her dismissal. As the trier of fact, only the jury could have determined if the decision to dismiss Ms. Mauriello was legitimately founded

in the former faculty advisor's evaluations of Ms. Mauriello's academic performance or instead that evidence of such evaluations was not believable.

Despite conflicting evidence in the record as to the circumstances of Ms. Mauriello's dismissal, the Court of Appeals held that no factual issues existed to submit to the jury because respondents' introduced evidence that evaluations of Ms. Mauriello had occurred. The Court of Appeals' ruling improperly invades the province of the jury as it denies Ms. Mauriello the opportunity to show — and to have the jury determine — that respondents' evidence that evaluations occurred was nothing but "pretextual attempts" to disguise unlawful conduct. *Cf. Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Ms. Mauriello, by her case-in-chief coupled with testimony obtained through cross-examination, proved — as the jury so found — such pretext, *see Burdine;* she proved that her dismissal was not the result of "an expert evaluation of cumulative information," *Horowitz,* 435 U.S. at 89-90.

Even though it occurs in an academic setting, where constitutionally impermissible conduct is alleged and *prima facie* established, Ms. Mauriello should be allowed to show that respondents' reasons for dismissing her were a pretext or not worthy of belief. *Cf. Burdine, supra.* However, under the Court of Appeals' decision, respondents, by merely articulating an "academic" reason for dismissing Ms. Mauriello, effectively and forever bar examination of the legitimacy of their stated reasons under all circumstances.

If the jury cannot examine the validity of academic decisionmaking, then despite the language in *Ewing,* there is not even a "narrow avenue" of judicial review left available and the university becomes the final arbiter of all decisionmaking so long

as the decision is labeled "academic." The jury was not asked to consider the merits of a judgment as to Ms. Mauriello's academic performance. Rather, it was asked to resolve whether, in the first instance, the judgment made was based in substance on academic grounds. As in the context of employment discrimination, Ms. Mauriello should be afforded a "fair opportunity" to show that the "academic" reasons offered by respondents are not "genuine" or that they fall "beyond the pale of reasoned academic decisionmaking."

The Court of Appeals also removed from the jury determining whether Ms. Mauriello's procedural due process rights were violated. The Court of Appeals stated that Ms. Mauriello's informal meetings with her faculty advisor satisfied Ms. Mauriello's procedural due process rights. 781 F.2d at 52 (22a). This result is wrong.

It is respectfully submitted that this Court also grant this petition to determine that procedural due process is satisfied only if the informal faculty evaluation occurs between the student and the administrative body dismissing the student. *See Goss v. Lopez* 419 U.S. 565, 584 (1975). At the minimum, if an informal meeting occurs between student and faculty member, that faculty member should have some responsibility for the decision to dismiss. Ms. Mauriello's meetings with her faculty advisor were not meaningful regarding the decision to dismiss Ms. Mauriello. They could not be as Ms. Mauriello's faculty advisor neither dismissed Ms. Mauriello nor recommended her dismissal. She lacked authority to do so.

As demonstrated at trial, Ms. Mauriello did not have an informal faculty evaluation with the Graduate Committee which dismissed her. Ms. Mauriello did not present a grievance to the Graduate Committee. Rather, she met with the Graduate Committee in a procedure to find Ms. Mauriello a new faculty

advisor. Perhaps that was why the jury found that no member of the Graduate Committee which dismissed Ms. Mauriello academically evaluated her.

CONCLUSION

For the foregoing reasons stated, this Court should grant the writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted

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DATED: May 16, 1986

APPENDIX A—JUDGMENT OF THE DISTRICT COURT ENTERED ON THE DOCKET AUGUST 13, 1984

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

CIVIL ACTION FILE NO. 83-1569

DIANE L. MAURIELLO

vs.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF N.J., et al

JUDGMENT

This action came on for trial before the Court and a jury, Honorable FREDERICK B. LACEY, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that a judgment be and is hereby entered in favor of the plaintiff, Diane L. Mauriello, and against the defendants, The University of Medicine and Dentistry of N.J., the Graduate School of Biomedical Sciences, Giampiero di Mayorca and Rodney Rothstein, with damages in the sum of $50,015.00 assessed to defendant The University of Medicine and Dentistry of N.J., with costs and attorney's fees.

Dated this 8th day of August, 1984

s/ F. B. Lacey
UNITED STATES DISTRICT
JUDGE

APPENDIX B—ORDER OF THE DISTRICT COURT ENTERED ON THE DOCKET AUGUST 28, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HON. FREDERICK B. LACEY
CIVIL ACTION NO. 83-1569(L)

DIANE L. MAURIELLO,

Plaintiff,

v.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, et al.,

Defendants.

ORDER

THIS MATTER, having been opened to the Court on the motion of defendants, by Irwin I. Kimmelman, Attorney General of New Jersey, appearing on behalf of defendants (Barbara A. Harned, Esq. appearing) for an Order vacating the damage award returned by the jury on July 31, 1984 in this matter, entering judgment notwithstanding verdict, or, in the alternative, granting defendants a new trial as to all issues in the case including on the grounds that the verdict for plaintiff in the amount of $50,015.00 was excessive, against the weight of the evidence and given under the influence of passion or prejudice and granting a stay of execution of judgment and injunction pending appeal and for an Order dismissing the complaint against defendants

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The University of Medicine and Dentistry of New Jersey and The Graduate School of Biomedical Sciences on the grounds of Eleventh Amendment immunity; and Ellenport & Holsinger, P.A., attorneys for plaintiff, Diane L. Mauriello, (Robert S. Ellenport, Esq. appearing) appearing in opposition thereto; and the Court having read and considered the moving papers and memoranda of law; and having considered all of the evidence and being fully informed; and having heard the argument of counsel; and for good cause shown,

It is on this 17 day of August 1984,

ORDERED, that defendants' motion for an Order vacating the damage award of $50,000.00 returned by the jury on July 31, 1984 in this matter be and is hereby denied; and it is further

ORDERED, that defendants' motion pursuant to Fed.R.Civ.P. 50 for an Order for judgment notwithstanding verdict as to the jury's verdict finding a violation of plaintiff's substantive due process rights be and is hereby denied; and it is further

ORDERED, that defendants' motion in the alternative pursuant to Fed.R.Civ.P. 59 for an Order granting defendants a new trial as to the jury's verdict finding a violation of plaintiff's substantive due process rights be and is hereby denied; and it is further

ORDERED, that the Court being of the opinion that the jury's damage award is excessive, defendants' motion in the alternative pursuant to Fed.R.Civ.P. 59 for an Order granting defendants a new trial as to all issues in the case be and is hereby granted only as to the issue of damages but that the verdict stand

good in all other respects; and that a new trial be and is hereby granted only on the issue of damages, unless plaintiff or her attorney consents to remit the sum of Forty Thousand ($40,000.00) Dollars on the judgment entered in this case within fourteen (14) days from the date of this Order; and if plaintiff or her attorney consents to remit the sum of Forty Thousand ($40,000.00) Dollars on the judgment entered in this case within fourteen (14) days from the date of this Order, defendants' motion for a new trial is in all respects denied; and in that event, the Clerk of the Court is directed to correct the judgment entered in this case so as to conform to the amount of the verdict as herein reduced; and it is further

ORDERED, that the motion of defendants University of Medicine and Dentistry of New Jersey and Graduate School of Biomedical Sciences to dismiss the complaint on the grounds of Eleventh Amendment immunity be and is hereby denied; and it is further

ORDERED, that defendants and their respective agents, servants, employees, attorneys and those persons in active concert or participation with them be and hereby are required and directed to specifically perform in good faith and fair dealing as follows:

> 1. An *ad hoc* committee shall be formed consisting of three (3) members selected as follows: Within fifteen (15) days of the date of this Order, plaintiff shall provide defendants and their attorney with written notice designating to serve on said committee one (1) faculty member who is in the Department of Microbiology of the Rutgers Medical School, Piscataway, New Jersey. Within fifteen (15) days after receipt of plaintiff's said

notice, defendants shall provide plaintiff and her attorney with written notice designating to serve on said committee one (1) faculty member who is in the Department of Microbiology of either defendant University of Medicine and Dentistry of New Jersey or the Rutgers Medical School, Piscataway, New Jersey. The two faculty members thus chosen shall within twenty (20) days of written selection of the second faculty member, and in good faith and fair dealing, meet and select the third member who shall have scientific expertise in the field of microbiology and shall be on the faculty of the Department of Microbiology or its equivalent of any accredited college or university other than and not associated with defendant University of Medicine and Dentistry of New Jersey. Upon the acceptance by the third member to serve on the *ad hoc* committee, the *ad hoc* committee shall provide written notice to the parties and their attorneys of the name of the third member so selected.

2. Within thirty (30) days of the date of this Order, defendants shall act in good faith and fair dealing to facilitate a meeting between plaintiff and Vilma K. Jansons, Ph.D. to discuss research that plaintiff believes Jansons may possess or control and which refers, evidences or relates in any way to plaintiff's thesis proposal.

3. Within thirty (30) days of the selection of the third member, unless plaintiff and the *ad hoc* committee agree otherwise, plaintiff shall present

her thesis research material to a meeting of the *ad hoc* committee. At least fourteen (14) days prior to said meeting, the *ad hoc* committee shall notify plaintiff in writing, with a copy to plaintiff's counsel, of the date on which the meeting will be held, of the manner in which plaintiff is to make her presentation and whether or not the *ad hoc* committee desires to review plaintiff's thesis research materials prior to said meeting. The *ad hoc* committee shall act promptly and in good faith and fair dealing in reviewing plaintiff's presentation of her thesis research material. No member of the *ad hoc* committee shall meet or discuss with any other person plaintiff's presentation or thesis research material, without plaintiff's prior written consent. The *ad hoc* committee shall meet with plaintiff at such site as shall be selected by at least two of the three faculty members. A verbatim record shall be made of plaintiff's presentation. Decisions of the *ad hoc* committee shall be by majority vote and its discussions and deliberations shall be closed to any other person. Subject to further order of the Court, plaintiff shall bear all costs and expenses, if any, of the member she selects, defendants shall bear all costs and expenses, if any, of the member they select and plaintiff and defendants shall equally bear the costs and expenses, if any, of the third member selected.

4. Within fifteen (15) days of plaintiff's presentation to it, the *ad hoc* committee shall, in writing, advise both plaintiff and defendants

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Giampiero di Mayorca and Graduate School of Biomedical Sciences of its recommendation either that: (a) plaintiff's thesis research material as presented is acceptable as sufficient for plaintiff to commence writing a final thesis and preparing for a public defense of the final thesis before an Examination Committee to be selected pursuant to the *Guidelines* of The Graduate School of Biomedical Sciences; or (b) plaintiff's thesis research material requires substantial additional work; or (c) plaintiff's thesis research is not of good scientific quality and Ph.D. caliber;

5. Defendant Giampiero di Mayorca, having advised the Court that he will accept any of the *ad hoc* committee's recommendations, shall, within seven (7) days of his receipt of said recommendation, forward said recommendation to defendant Graduate School of Biomedical Sciences, which shall within seven (7) days of its receipt of said recommendation from defendant Giampiero di Mayorca, present said recommendation to the Admissions Review Committee of defendant Graduate School of Biomedical Sciences which shall within seven (7) days of its receipt of said recommendation, act in good faith and fair dealing to implement the *ad hoc* committee's recommendation referred to in subparagraph 4 hereof and to reinstate plaintiff as a Ph.D. candidate in the Department of Microbiology upon receipt of the *ad hoc* committee's written recommendation, provided that within fourteen (14) days of the *ad hoc*

committee's written recommendation being submitted to plaintiff and defendant Giampiero di Mayorca, any faculty member of defendant University of Medicine and Dentistry of New Jersey, regardless of department, agrees to serve as plaintiff's thesis faculty advisor. If the recommendation of the *ad hoc* committee is that referred to in subparagraph 4(a) hereof, plaintiff shall commence writing her final thesis of the thesis proposal presented to the *ad hoc* committee. If the recommendation of the *ad hoc* committee is any other than that referred to in subparagraph 4(a) hereof, counsel for the parties shall in good faith promptly meet to mutually determine the form, content and structure of plaintiff's future course of study as a doctoral candidate in the University of Medicine and Dentistry of New Jersey. Should counsel fail to reach mutual agreement, either party may apply to the Court, upon fourteen (14) days' written notice to the other party, for a hearing and determination of matters in dispute. In all other respects, all Ph.D. candidate guidelines of defendant University of Medicine and Dentistry of New Jersey and Graduate School of Biomedical Sciences shall apply to plaintiff in the same manner in which they apply to other Ph.D. candidates.

6. Defendants University of Medicine and Dentistry of New Jersey, Graduate School of Biomedical Sciences and Giampiero di Mayorca shall, in good faith and fair dealing, assist plaintiff in finding a thesis faculty advisor; and

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7. Upon a faculty member agreeing to serve as plaintiff's thesis advisor, all Ph.D. candidate guidelines of defendant University of Medicine and Dentistry of New Jersey and Graduate School of Biomedical Sciences shall apply to plaintiff in the same manner in which they apply to other Ph.D. candidates.

and it is further

ORDERED, that defendants' motion pursuant to Fed.R.Civ.P. 62 (c) and (d) for an Order granting a stay of injunction pending appeal be and is hereby denied; and it is further

ORDERED, that this Court shall retain jurisdiction;

All of the above as set forth in the memorandum opinion of the Court placed in the record on August 10, 1984.

s/_____
FREDERICK B. LACEY,
U.S.D.J.

APPENDIX C—OPINION OF THE COURT OF APPEALS

Diane L. MAURIELLO,
Appellant in 84-5720,

v.

the UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, the Graduate School of Biomedical Sciences, Giampiero di Mayorca, M.D., individually and as Chairperson of the Department of Microbiology, Rodney Rothstein, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, Vilma K. Jansons, Ph.D., jointly and severally,

Appellants in 84-5666.

Nos. 84-5666, 84-5720.

United States Court of Appeals,
Third Circuit.

Argued Nov. 6, 1985.

Decided Jan. 14, 1986.

* * *

Robert S. Ellenport (Argued), Marie P. Simonelli, Perry Feinberg, Ellenport & Holsinger, P.A., Roseland, N.J., for appellant Diane L. Mauriello.

Barbara A. Harned (Argued), Andrea M. Silkowitz, Deputy Attys. Gen., Irwin I. Kimmelman, Atty. Gen., N.J., Newark, N.J, for appellants—the University of Medicine and Dentistry of New Jersey, Giampiero di Mayorca, and Rodney Rothstein.

Appendix C

Before SEITZ, WEIS and ROSENN, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge.

This case presents the issue of due process requirements in the dismissal of a student from a state university's graduate program. After reviewing the record, we conclude that a series of informal academic evaluations by the faculty met constitutional standards and prevents judicial reexamination of the plaintiff's fitness to continue at the University. Accordingly, we will set aside a jury's damage award and a district court decree directing reinstatement pending reevaluation.

The plaintiff's complaint sought damages and injunctive relief under 42 U.S.C. § 1983 against the University of Medicine and Dentistry of New Jersey, as well as Professors Jansons, di Mayorca, and Rothstein. A jury allowed damages against the University, and by way of equitable relief the court directed a reevaluation of the plaintiff's academic work. Defendants have appealed the denial of their post-trial motions. Plaintiff has cross-appealed.

The University is a public institution of higher learning, and it is uncontested that the requisite state action exists.

Plaintiff was admitted to the doctoral program in microbiology at the University in 1975. She withdrew after a few weeks and was readmitted in September 1977. She completed her course requirements in 1979, and selected as her faculty advisor Dr. Vilma Jansons, who had access to a laboratory and was conducting research in an area of interest to plaintiff.

Appendix C

The faculty advisor provides a student with the laboratory facilities, funding, and guidance needed to research a thesis. That professor is also responsible for evaluating a student's progress. After obtaining approval from the advisor, a student must submit a thesis and a dissertation abstract to an evaluation committee for review. If the work is acceptable, the committee will recommend that a doctorate be awarded.

In 1980, plaintiff submitted a thesis proprosal to Dr. Jansons and passed a qualifying examination. Plaintiff was required to submit a revision of her thesis proposal but did not do so for some twenty months. She finally obtained approval on July 9, 1982.

Part of the plaintiff's research efforts were incorporated into scientific papers that Dr. Jansons submitted for publication. These articles were rejected because of erroneous data, and this disapproval led Dr. Jansons to reevaluate the plaintiff's work. Deciding that she could no longer sponsor the plaintiff's research, Dr. Jansons, on September 3, 1982, wrtoe to Dr. di Mayorca, Chairman of the Department of Microbiology, stating that she was withdrawing as the plaintiff's faculty advisor as of December 31, 1982. The letter noted that there had been "less than satisfactory progress in [plaintiff's] research and several demonstrated instances of severe lack of understanding of the most pertinent data in the literature . . . Diane's commitment to research is not serious."

Plaintiff then met with Dr. di Mayorca and was told to "go back to the lab to correct the inaccuracies" in the research. On returning to the laboratory and discussing the matter further with Dr. Jansons, plaintiff resumed her research on a probationary basis. However, in November 1982, plaintiff accepted full-time

employment with an outside corporation, and limited her work in Dr. Jansons' laboratory to a part-time basis.

Soon thereafter, Dr. Jansons sent a note to plaintiff expressing dissatisfaction with her work. Setting an absolute deadline for certain assignments, Dr. Jansons wrote, "Where is the change that you said took place this autumn in you and according to you made you worthy of defending a Ph.D. thesis? It was, perhaps, different for some weeks after you were put on probation; now it's business as usual—total irresponsibility."

Because of the plaintiff's lack of progress and dedication, on December 15, Dr. Jansons submitted a report to Dr. Rothstein, Chairman of the Graduate Committee, stating that she would not sponsor the plaintiff's research after January 1, 1983. The memo continued, "[Plaintiff had] assured me that her performance would improve and, if not, she would withdraw from the graduate school. There has not been any improvement."

Plaintiff had met with Dr. Rothstein on December 14th and had explained her difficulties with Dr. Jansons. Plaintiff agreed to meet on January 6, 1983 with the graduate committee, an entity that serves as an advisory body to the department chairman on matters pertinent to Ph.D. candidates. In the meantime, plaintiff took no steps to secure another faculty advisor.

There was a dispute at trial over the instructions plaintiff was given as to the material she was to present at the January meeting. In any event, plaintiff arrived with only some of the data she used in the faulty experiments performed for Dr. Jansons. The committee, however, wanted to see the thesis material as well as some other extraneous research notes and scheduled another meeting for February 2nd. Before that occurred, the committee

met with Dr. Jansons to discuss her appraisal of the plaintiff's work. At the conclusion of that conference, some consideration was given to dismissing plaintiff from the doctoral program.

At the meeting on February 2nd, plaintiff again appeared without the thesis data. She testified she did not bring that material because Dr. di Mayorca had told her to bring the extraneous research notes instead. Because plaintiff again did not have the desired material, the committee scheduled a third meeting. Two days later, plaintiff told Dr. di Mayorca she would be unable to present the extraneous research because Dr. Jansons possessed much of it. Dr. di Mayorca was surprised that plaintiff did not have the documents because graduate students normally possess several copies of data from experiments they conduct.

Dr. di Mayorca advised the committee members that plaintiff was unable to produce the requested material, and therefore a majority adopted the previously tentative decision to dismiss. Accordingly, on February 14, 1983, Dr. Rothstein notified plaintiff that she was no longer a candidate for a Ph.D. degree.[1]

At trial the district court ruled as a matter of law that the plaintiff's termination was an academic dismissal, not a disciplinary one. All claims against Dr. Jansons were dismissed, as were the counts for punitive and compensatory damages against Professors di Mayorca and Rothstein. The compensatory damage

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1. The notice also stated that since plaintiff had fulfilled the requirements of an M.S. degree in microbiology, the committee recommended that she be awarded that degree. Several weeks later, however, plaintiff was informed that she was ineligible for the Master's degree because she had not submitted a thesis for approval. It appears that she is still eligible for that degree if she prepares an acceptable thesis.

claim against the University was submitted to the jury. All defendants, except Dr. Jansons, remained in the case for injunctive purposes.

In response to special interrogatories, the jury found that the University did not provide the requisite procedural due process, that the plaintiff's academic performance was not reviewed before dismissal, and that the defendant's action was arbitrary and capricious. The jury awarded $50,015 in compensatory damages.

Finding the verdict excessive, the district court directed a remittitur of $40,000, which the plaintiff accepted. As an equitable remedy, the district court ordered the parties to select an ad hoc committee of three persons, one member selected by plaintiff, one by the defendants, and the third by the two selected members. This committee was to review the plaintiff's thesis research material. Plaintiff was reinstated into the doctoral program and was permitted to make a presentation to the ad hoc committee.[2] The court also denied the defendants' post-trial motions for a new trial and judgment n.o.v.

On appeal, defendants contend that plaintiff did not have a property interest in continuing in the program, but even assuming the existence of such an interest, due process requirements were satisfied, and the dismissal was not arbitrary or capricious. Other issues raised in both the direct and cross-appeals need not be discussed in view of our disposition.

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2. After reviewing the dissertation material, the ad hoc committee met with plaintiff on October 9, 1985 and reported its unanimous decision that the plaintiff's research was "not so good scientific quality and Ph.D. caliber."

I.

Preliminarily, we address a jurisdictional matter. The district court's order denying the defendants' motions for judgment n.o.v. and new trial was docketed on August 28, 1984. The order stated that a new trial would be granted "unless plaintiff . . . consents to remit the sum of $40,000 . . . within 14 days." Plaintiff did so, and the acceptance was docketed on August 31, 1984. The notice of appeal was filed on September 28, 1984.

The question is whether the judgment became final when the remittitur order was entered or when the plaintiff's acceptance was filed. We conclude that the latter date is determinative for computing the time for appeal.

In *United States v. Schaefer Brewing Co.*, 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958), the Court said that "[i]t is necessary to determine whether the language of the opinion embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case. If it does so, it constitutes his final judgment." *Id.* at 232, 78 S.Ct. at 678. To be final, a "judgment for money must, at least determine, or specify the means for determining the amount." *Id.* at 233, 78 S.Ct. at 678.

An issue similar to the one here was decided in *Howell v. Marmpegaso Compania Naviera, S.A.*, 566 F.2d 992, 993 (5th Cir. 1978). The court held that until the plaintiff consented to the "remittitur, the judgment remained open, unfinished and inconclusive . . . . [A]cceptance of the remittitur rendered the judgment final and appealable, and actuated the 30-day time limit within which a notice of appeal must be filed." *See Also Gila River Ranch, Inc. v. United States,* 368 F.2d 354, 357 (9th Cir. 1966); 15 C. Wright & A. Miller & Cooper, *Federal Practice and Procedure* §3915, at 603-04 (1976).

In the case at hand, until plaintiff accepted the remittitur, the University did not know the extent of its liability. The amount of the judgment was not fixed until plaintiff filed her consent, and at that point the time for appeal began to run. The notice of appeal was filed within 30 days of the plaintiff's acceptance, and therefore was timely.

II.

We turn now to the merits of the case. The Supreme Court had occasion to discuss the due process rights of students in state operated universities in *Board of Curators of the University of Missouri v. Horowitz,* 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) and *Regents of the University of Michigan v. Ewing,* ____ U.S. ____, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). *Horowitz* focused on procedural due process, while in *Ewing* the student's claim was based on substantive due process. In both cases the Court specifically assumed without deciding the existence of liberty or property interest but found no basis for holding the universities liable.

The Court has made a clear distrinction between disciplinary and academic dismissals. In the latter circumstances, courts are ill-equipped to review the largely subjective academic appraisals of the faculty. "[T]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Horowitz*, 435 U.S. at 90, 98 S.Ct. at 955. A formal hearing is not necessary; rather an "informal-give-and take" between the student and the administrative body dismissing her is adequate. "[A] hearing may be useless or harmful in finding out the truth as to scholarship." *Id.* Thus, in the procedural due process context, informal review

and evaluation sessions between student and faculty meet constitutional requirements.

In the *Ewing* substantive due process context, the Court assumed "the existence of a constitutionally protective right in [the student's] continued enrollment" but found, after reviewing the record, that the right had not been violated. The student's dismissal "rested on an academic judgment that is not beyond the pale of reasoned academic decisionmaking when viewed against the background of his entire career at the University."

The Court observed that when judges are asked to "review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." The Court further noted that the judges have a special responsibility to safeguard the academic freedom of state and local educational institutions. ____ U.S. at ____, 106 S.Ct. at 513. *See also Stevens v. Hunt*, 646 F.2d 1168 (6th Cir. 1981); *Ikpeazu v. The University of Nebraska*, 775 F.2d 250 (8th Cir.1985); *Hines v. Rinker*, 667 F.2d 699 (8th Cir.1981); *Miller v. Hamline University of Law*, 601 F.2d 970 (8th Cir.1979).

In his concurrence in *Ewing*, Justice Powell wrote that the student's "claim to a property right is dubious at best," and noted that in contrast to the procedural due process cases where the protected interests originate under state law, substantive due process rights are created by the federal constitution. He found that the student's claim bore "little resemblance to the fundamental interests that previously had been viewed as implicitly protected by the Constitution." ____ U.S. at ____, 106 S.Ct. at 516.

Appendix C

We have no difficulty in deciding that the plaintiff's dismissal here was based on academic not disciplinary grounds. As the district judge stated, "it was not a case of her being compelled by rule, order, or law of the school to do something and not having done it getting discharged . . . . This is not a case of somebody being disruptive in her misconduct, it is not a *Goss v. Lopez*, [419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)] situation." The focus of the University's inquiry was on the quality of the plaintiff's research and her dedication to academic pursuits, not misconduct.

In denying the defendants' motion for a directed verdict, the district judge said he believed that *Horowitz* required some kind of a hearing for plaintiff by the University. His views of the applicable law are reflected in his charge to the jury: "plaintiff had a right to notice of what the proceedings before the graduate committee would involve, and that she be aware, or be made aware, of whatever action was being considered with respect to her, and that she be given an opportunity to present her side of the case before being dismissed from the Ph.D. program."

On the issue of substantive due process, the jurors were told to determine whether the defendants' actions were arbitrary or capricious—whether there was a rational basis for the dismissal based on the quality of the plaintiff's work, or whether the defendants' decison was motivated by bad faith or ill-will, without any relationship to her academic performance.

We conclude that the submission of these matters to the jury was error because the plaintiff's proof was insufficient to survive the defendants' motion for a directed verdict. In reviewing the denial of a judgment n.o.v., we must consider the facts in the light most favorable to plaintiff. *Kademenos v. Equitable Life*

Appendix C

Assurance Soc., 513 F.2d 1073 (3d Cir.1975); *Dudley v. South Jersey Metal, Inc.*, 555 F.2d 96 (3d Cir.1977); *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095 (3d Cir.1980). However, if after review of the facts, it appears that under the applicable law the plaintiff has failed to present sufficient evidence to establish a claim, then judgment must be entered for the defendant. *See Molthan v. Temple University*, 778 F.2d 955 (3d Cir.1985); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir.1981); *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir.1969).

In essence, plaintiff asserts that the graduate committee arbitrarily dismissed her because she did not produce the requested records. The testimony at trial shows that this was only one of the factors considered. It is not disputed that plaintiff made serious errors in research and that as early as September 1983 Dr. Jansons communicated her dissatisfaction to Dr. di Mayorca. After being granted a probationary period, plaintiff accepted full-time outside employment while failing to show improvement in her academic work. Characterizing the plaintiff's attitude as irresponsible, Dr. Jansons wrote once more to the graduate committee that she would no longer sponsor the plaintiff's research or serve as faculty advisor.

Plaintiff then chose to discuss the matter with the graduate committee. As the trial judge phrased it, the "ball was in her court" but she made no effort to secure another faculty advisor, explaining that she expected help from the committee.

In three scheduled meetings with the graduate committee, plaintiff failed to produce materials that the average doctoral candidate would have expected to be of prime interest to the faculty. Plaintiff explained that on the first two occasions she was misled by the instructions given her. The third meeting never

occurred because allegedly she could not obtain some of the extraneous research data. A doctoral candidate's failure to keep and maintain research notes is an additional fact that the faculty may consider in evaluating a student's academic performance.

Plaintiff cannot deny that she was aware of the criticism of her research abilities or that she was twice informed her faculty advisor was going to withdraw. Unquestionably, plaintiff was on notice no later than September 1982 that her continuance as a Ph.D. candidate was in jeopardy.

In an educational setting, a student bears a heavy burden in persuading the courts to set aside a faculty's judgment of academic performance. This record leaves no doubt that the academic record of plaintiff was a determinative, if not the sole, reason for her dismissal.

The district court's concern that the University did not provide notice and opportunity for plaintiff to present an explanation of her position was misguided in two respects. The court focused on the last of the three scheduled meetings with the committee but failed to consider events begining in September 1982. In addition, the court unduly equated procedural due process in this case to the more traditional trial type proceeding. However, as stated in *Horowitz* and *Ewing*, when a student is discharged for academic reasons, an informal faculty evaluation with the student is all that is required.

Here, plaintiff was informed of her academic deficiencies, was given an opportunity to rectify them during a probationary period before being dismissed, and was allowed to present her grievance to the graduate committee. That she was eventually

dismissed does not negate the existence of those favorable forms of due process.

It follows that there were no factual issues to submit to the jury because, as a matter of law, the plaintiff had received all the procedural due process to which she was entitled.

A similar result obtains with respect to the substantive due process cliam. We share Justice Powell's doubt about the existence of such a substantive due process right in the circumstances here, but following the lead of the Supreme Court, we will assume *arguendo* that a constitutional right is implicated. Even so, we are required to show "great respect for the faculty's professional judgment." *Ewing*, ____ U.S. at ____, 106 S.Ct. at 513. The one faculty member who had the most extensive knowledge of the plaintiff's capabilities and attainments, or lack of them, was Dr. Jansons. Her evaluations are clear and forthright, and there is no basis for us or a jury to question her judgment.

In view of the professional evaluations contained in this record, we cannot say that the dismissal of plaintiff from the doctoral program was "beyond the pale of reasoned academic decisionmaking." *Id.* Likewise, we cannot say that the University impermissibly considered the plaintiff's choice to take outside full-time employment during her probationary period. Moreover, her failure to keep proper records demonstrated "a lack of judgment and inability to set priorities." *Ewing*, ____ U.S. ____ n. 13,106 S.Ct at 514 n.13.

Although there may have been personality conflicts between plaintiff and some of the faculty members, the evidence does not permit a finding that the plaintiff's dismissal was for reasons other than the quality of her academic performance.

Appendix C

Accordingly, the judgment of the district court will be vacated and judgment will be entered for defendants.

APPENDIX D—ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5666 and 84-5720

DIANE L. MAURIELLO,

Appellant in 84-5720

v.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO di MAYORCA, M.D., individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. Jansons, Ph.D., jointly and severally,

Appellants in 84-5666

(D.C. Civ. No. 83-1569)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and ROSENN, *Circuit Judges*.

Appendix D

The petition for rehearing filed by appellant/cross-appellee in the above entitled case having been sumbitted to the judges who participatedin the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ Weis

Circuit Judge

DATED: February 18, 1986

APPENDIX E—TRIAL TRANSCRIPT OF JURY ANSWERS TO SPECIAL INTERROGATORIES

[Beginning at page 804-2 thru 14]

* * *

Question Number 1, "Has plaintiff proved that the defendant did not give her procedural due process in connection with her dismissal from the PhD program?" You've answered that yes.

Question Number 2, "Has plaintiff proved that the defendant did not evaluate her academic performance prior to dismissing her from the PhD program?" You've answered that yes.

Number 3, "Has plaintiff proved that her dismissal from the PhD program was arbitrary and capricious?" And you've answered that yes.

Item number 4, "Plaintiff has proved damages in the amount of" and you've supplied the figure there, $50,015.

* * *

(7)

No. 85-1921

Supreme Court, U.S.
FILED
JUN 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DIANE L. MAURIELLO,

Petitioner,

vs.

THE UNIVERSITY OF MEDICINE AND DENISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO di MAYORCA, M.D., individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., jointly and severally,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 85-1921

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DIANE L. MAURIELLO,

Petitioner,

vs.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO di MAYORCA, M.D., individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., jointly and severally,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counterstatement of the Case

Petitioner, Diane L. Mauriello, was accepted as a student in the doctoral program in microbiology at the respondent University in 1977 (Pa11).* A requirement for the awarding of the Ph.D. degree is the completion and defense of a research dissertation thesis by the student (Pa12). The research necessary for the thesis is conducted by the student in the laboratory of a faculty advisor selected by the student (Pa11 to Pa12). The advisor provides a student with laboratory facilities, funding and guidance and is responsible for evaluating a student's progress (Pa12).

Mauriello completed her course requirements in 1979 and selected Dr. Vilma Jansons as her faculty advisor (Pa11). As required by the Graduate School, Mauriello presented a thesis proposal to Dr. Jansons in 1980 (Pa12). The proposal, however, was not acceptable and revisions were required. Mauriello did not submit a revised proposal until twenty months later (Pa12).

While Dr. Jansons found serious weaknesses in Mauriello's work between 1979 and 1981, she allowed Mauriello to continue because her mother was very ill at the time. Moreover, because of Mauriello's poor background in biochemistry, Dr. Jansons found it difficult to decide if Mauriello would eventually overcome her weaknesses (Ja542 to 543, Ja548).** In 1982, some of Mauriello's research was incorporated in scientific papers which had

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* Pa refers to petitioner's appendix.

** Ja refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit in appeal numbers 84-5666 and 84-5720.

been submitted for publication (Pa12). The rejection of the articles led Dr. Jansons to reevaluate Mauriello's work (Pa12). Upon doing so, Jansons found several serious errors in the reported results of experiments conducted by Mauriello and significant errors in the manner in which she conducted research (Ja551-10, Ja193, Ja550-8, Ja552-10 to Ja557-4, Ja653-7 to 17, Ja756-3 to 13). The severity of these errors led Dr. Jansons to advise Mauriello that she would withdraw as her faculty advisor and could no longer sponsor her research (Pa12). Following discussion with Mauriello, Jansons agreed to give her another chance and Mauriello returned to the laboratory on a probationary basis (Pa12). In November, 1982, however Mauriello accepted full-time employment with an outside corporation and limited her work in the laboratory to, at best, a part-time basis (Pa12 to Pa13).

At the end of November, 1982 Jansons sent a note to Mauriello expressing dissatisfaction with her work (Pa13). Inquiring about the status of the corrections of the research errors Mauriello was supposed to have made, Dr. Jansons wrote "[w]here is the change that you said took place this autumn in you and according to you made you worthy of defending a Ph.D. thesis? It was, perhaps, different for some weeks after you were put on probation, now it's business as usual—total irresponsibility" (Pa13). In this note, Jansons also advised Mauriello that the corrections were needed by a certain date in order to complete a presentation that was to be given on December 2, 1982 (Pa13). On November 26, 1982 Jansons and Mauriello met in Jansons' office at which time Mauriello did not have the corrections, told Jansons that she did not need the corrections and offered other excuses for not having completed the work. After listening to Mauriello,

Jansons informed her that she would no longer sponsor her research (Ja569-8 to Ja571-5, Ja192).

In a memorandum dated December 15, 1982 Jansons informed Dr. Rothstein, Chairman of the Department's Graduate Committee, that she would not sponsor Mauriello's research after January 1, 1983 and further advised Dr. Rothstein that Mauriello had "assured me that her performance would improve and, if not, she would withdraw from the graduate school. There has not been any improvement" (Pa13). It is uncontradicted that a graduate student at this stage of the doctoral program cannot continue in the program without a faculty advisor and that Mauriello was aware of this requirement. It is also uncontradicted that Mauriello took no steps at this time to secure another facutly advisor and that no committee or individual at the University has the authority to compel a faculty member to serve as an advisor (Ja691-23, Ja355-24 to Ja356-1, Ja360-20 to 361-1, Ja698-11, Ja650-17 to 651-7, Ja705-25, Ja702-16).

Instead of seeking another faculty advisor, Mauriello approached the chairman of the department's Graduate Committee, Dr. Rothstein, concerning her situation with Dr. Jansons (Pa13). The Graduate Committee serves as an advisory body to the Chairman of the Department but does not have the authority to appoint a faculty advisor (Ja698-12). Dr. Rothstein was given the impression by Mauriello that she was almost finished with her thesis. He agreed to convene the Committee in January, 1983 in an effort to mediate the dispute and, according to his testimony, advised Mauriello to bring data to the committee meeting to corroborate her statement that her thesis was almost finished (Ja695-18 to Ja696-22). The precise in-

structions given to Mauriello as to what material she was to present at the meeting are disputed with Mauriello testifying that she was told to bring only data on the research errors she claimed had been corrected and on extraneous non-thesis research she had done in Jansons' laboratory (Pa13).

It is undisputed that Mauriello was not prepared to give a presentation of her thesis at the January meeting and that the Committee agreed to convene again on February 2, 1983 for the presentation (Pa13). It is further undisputed that the Committee then met with Dr. Jansons who described the nature of the errors committed by Mauriello and that, following this meeting, a tentative decision to dismiss plaintiff from the program was made, pending her presentation before the Committee on February 2, 1983 (Pa14).

It is further undisputed that Mauriello appeared at the February 2, 1983 meeting unprepared to give the thesis presentation expected by the Committee (Pa14). Again, she testified that she had not been instructed to do so but rather to present non-thesis research she had accomplished. Since she did not have the requested material, the committee scheduled a third meeting (Pa14). Several days later, Mauriello admittedly contacted the chairman of the Department, Dr. di Mayorca, and told him that she would be unable to make the presentation because Jansons possessed much of her material (Pa14). Dr. Jansons, however, denied having any of Mauriello's material (Ja546-10 to 18). More importantly, it was inconceivable to Dr. di Mayorca that Mauriello did not have her data since graduate students normally possess several copies of data from experiments they conduct and it is always

the student's responsibility to maintain their research notebook (Pa14). Dr. di Mayorca advised the committee members that Mauriello was unable to produce the requested material and a majority of the Committee adopted the previously tentative decision to dismiss (Pa14). On February 14, 1983 Dr. Rothstein, on behalf of the Committee, advised Mauriello that the Committee had notified the graduate school that she was no longer a Ph.D. candidate in the Department of Microbiology (Pa14).

On June 9, 1983 Mauriello instituted suit in the Federal District Court of New Jersey pursuant to 42 *U.S.C.* § 1983 asserting that her procedural and substantive due process rights had been violated. Following a jury verdict in Mauriello's favor, the district court judge entered an order on August 28, 1984 which, *inter alia,* directed the parties to agree on selection of an ad hoc committee to review Mauriello's thesis research material (Pa15). While the matter was pending before the United States Court of Appeals for the Third Circuit, Mauriello made her presentation to the Ad Hoc Committee. After reviewing the material and her presentation, the Ad Hoc Committee rendered its unanimous decision on October 9, 1985 that Mauriello's research was "not of (*sic*) good scientific quality and Ph.D. caliber" (Pa15).

In reversing the judgment in favor of petitioner, the Circuit Court held that it was error to submit the case to the jury because petitioner's proof was insufficient to survive respondents' motion for a directed verdict (Pa19). Viewing all the facts in the light most favorable to petitioner, the court concluded that "under the applicable law the plaintiff failed to present sufficient evidence to establish a claim" and accordingly the Circuit Court ordered

judgment entered in favor of defendants (Pa19 to Pa20, Pa23).

Summary of Argument

The writ sought herein should be denied because petitioner has failed to demonstrate that the decision of the United States Court of Appeals for the Third Circuit conflicts with any principles enunciated by this Court in *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U.S. 78 (1978) and *Regents of University of Michigan* v. *Ewing*, —— U.S. ——, 106 S.Ct. 507 (1985). Rather, in deciding that Mauriello's rights had not been violated, the Circuit Court properly interpreted and applied the law governing due process requirements in academic dismissals of students. Contrary to petitioner's contentions, the Circuit Court did not improperly invade the province of the jury but instead properly held that Mauriello did not present sufficient evidence upon which a jury verdict in her favor could be sustained when the correct legal principles were applied and that the trial judge had erred in "unduly equat[ing] procedural due process in this case to the more traditional trial type proceeding" (Pa21). Since the decision below is entirely consistent with two recent rulings of this Court, no basis exists for granting review of the writ of certiorari.

ARGUMENT

The Writ should be denied because the decision of the United States Court of Appeals for the Third Circuit is fully consistent with this Court's recent decisions on the requirements of due process in academic dismissals.

In two recent cases, this Court has addressed the issue of due process requirements in the academic dismissal of a student from a state university's graduate program. *Regents of the University of Michigan* v. *Ewing (Ewing), supra; Board of Curators, Univ. of Mo.* v. *Horowitz (Horowitz), supra.* In both cases, the Court found it unnecessary to decide whether students in such instances have interests subject to the protections of the due process clause. *Ewing, supra,* 106 S.Ct. at 513; *Horowitz, supra,* 435 U.S. at 84. Rather, in both cases, the Court "assum[ed] the existence of a constitutionally protectible . . . right" and held that under the applicable standards the students had demonstrated no violation of those assumed rights. *Ewing, supra,* 106 S.Ct. at 513; *Horowitz, supra,* 435 U.S. at 84-85. This is precisely the manner in which the Circuit Court decided the instant appeal. Indeed, the opinion below expressly notes that the lower court was "following the lead of the Supreme Court" (Pa22). It requires only a brief analysis to demonstrate that the Circuit Court correctly interpreted and applied the *Horowitz* and *Ewing* decisions to the instant case and that, therefore, no justification exists for granting the writ.

Mauriello contends that her procedural due process rights were violated by the manner in which she was dismissed from the program. In *Horowitz,* the majority of

this Court rejected the argument that the constitution required a hearing in the case of an academic dismissal. 435 U.S. at 90-91. Since "(t)he educational process is not by nature adversary" and a hearing may be "useless or harmless in finding out the truth as to scholarship" the majority held "that dismissals for academic (as opposed to disciplinary) cause do not necessitate a hearing before the school's decisionmaking body." 435 U.S. at 87, 90 (quoting *Barnard* v. *Inhabitants of Shelburne*, 216 Mass. 19, 23, 102 N.E. 1095, 1097 (1913)).

Despite the clear holding in *Horowitz*, petitioner contends that in order to satisfy procedural due process, the administrative body which dismissed her, i.e. the Graduate Committee, must have academically evaluated her and that the evaluation by Dr. Jansons was insufficient to satisfy constitutional requirements. Firstly, requiring evaluation by the decisionmaking body is just another way of saying a hearing, formal or informal, must be held before that body, a requirement rejected in *Horowitz*. In a case such as this where only the faculty advisor and the student interact on the thesis research, evaluation by the Graduate Committee would of necessity require some type of hearing or presentation to that body.

Assuming *arguendo*, however, that petitioner's contention is well-taken, the record is abundantly clear that she was afforded such evaluation by the Graduate Committee. It is undisputed that petitioner appeared twice before the Committee and on both occasions was unprepared to give a thesis presentation and then advised the chairman that she could not do so since Dr. Jansons allegedly had her material. It is also undisputed that graduate students have the responsibility for maintaining their re-

search notes. Regardless of the reason for her unpreparedness on the first two occasions, the import of the fact that she failed to maintain proper records as expected of a graduate student at her level was an academic evaluation conducted by the Graduate Committee.

In *Horowitz,* the majority held that procedural due process in academic dismissals requires only that the student be informed of the faculty's dissatisfaction with her progress and the danger that this poses to continued enrollment. 435 U.S. at 85. The undisputed evidence is that Jansons had informed Mauriello of her dissatisfaction, had given her a probationary period to improve, had advised her in November, 1982 that she was withdrawing as her advisor and that Mauriello knew she could not continue in the program without an advisor. Based on this undisputed evidence, the jury could not have found a procedural due process violation had it been properly instructed on the applicable law. Contrary to petitioner's argument, *Horowitz* does not require that these steps actually be taken by the decisionmaking body. *See* 435 U.S. at 86-87. The charge by the trial judge, however, "unduly equated procedural due process in this case to the more traditional trial type proceeding" (Pa21). Instead of improperly invading the province of the jury as contended by petitioner, the Circuit Court corrected the error of the trial judge and determined based on undisputed evidence that petitioner had not advanced sufficient proof to take the issue to the jury.

Petitioner's contention that the Circuit Court improperly decided the issue of a substantive due process violation is similarly lacking in merit. Petitioner does not contend that the Circuit Court applied an erroneous legal

standard to the substantive due process issue. Rather, she contends that this Court's guidance is needed on a question of proof—i.e.—"how one proves if an academic decision was 'genuine' or not" (Petition at page 6). This issue, however, does not merit granting the writ to review the case since this Court has already set forth the standard of proof in *Ewing*. In such cases, the plaintiff must prove that the decision is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." 106 S.Ct. at 513.

Petitioner further contends that the Circuit Court's decision impermissably restricts a jury from deciding whether a decision was genuinely academic or pretextual in any case where the school merely presents evaluations of the student. This contention, however, misconstrues the Circuit Court's decision. Contrary to petitioner's suggestion, the opinion below does not say that there can be no violation shown merely if defendants introduce evaluations into the record. Rather, the lower court, after reviewing all the evidence submitted by plaintiff in the light most favorable to her, held that "the evidence does not permit a finding that the plaintiff's dismissal was for reasons other than the quality of her academic performance" (Pa19, Pa22). Thus, the Circuit Court found no support in the record for petitioner's contention that the decision to dismiss her was not a genuinely academic decision. Petitioner's attempts to point out "conflicting evidence" in the record which she contends is sufficient to make this a jury question are equally unconvincing. The main thrust of her argument seems to be that it was for the jury to decide whether this was a *bona fide* academic decision because she submitted proof that the Graduate

Committee never evaluated her academic work, that Dr. Jansons who did evaluate it did not dismiss her, and that the Graduate Committee did not consider Janson's evaluation because, after hearing the evaluation, the Committee considered finding a new advisor for her (Petition at pages 7 to 8). Firstly, under *Ewing* and *Horowitz* it is irrelevant whether it was the Committee or Dr. Jansons who evaluated petitioner's work. As stated in *Ewing*, plaintiff must show that the "*person* or committee responsible did not actually exercise professional judgment," 106 S.Ct. at 513 (emphasis added), and pursuant to *Horowitz* that judgment need not be reviewed by the decisionmaking body in order to satisfy due process requirements. 435 U.S. at 87. Secondly, the mere fact that the Committee may have considered another option before making its final decision proves absolutely nothing about the nature of its decision. Thirdly, petitioner contradicts her own argument by contending, on the one hand, that the Committee did not evaluate her work and, on the other hand, that the Committee heard Jansons' evaluation of her work.

Petitioner also argues that testimony she submitted showing she was dismissed because she did not have a faculty advisor and had not presented evidence of research sufficient to form the basis of a thesis justified having a jury decide whether her dismissal was "genuinely" academic. It is difficult to conceive, however, how this evidence would help to prove a non-academic decision had been made. She did not have an advisor because her advisor uncontrovertedly withdrew because of dissatisfaction with her work. Whether her research was sufficient to form the basis of a thesis is so clearly an academic judgment that further response is unnecessary.

Petitioner seems to suggest that since she presented evidence to dispute these reasons for her dismissal it was sufficient to make out a jury question as to whether the stated reasons were pretextual. The disputes which she raises, however, do not contradict the stated reasons for dismissal. Whether or not she met with the Committee to find a new advisor or whether or not she was stopped before presenting her data to the Committee is irrelevant to the issue of whether her dismissal involved an academic decision. At best, these disputed issues are relevant only to petitioner's claims of entitlement to a hearing before the Committee before dismissal.

Finally, petitioner's contention that it was uncontested at trial that the Committee never evaluated her performance or her academic record is erroneous. The only uncontested fact was that the Committee never evaluated Mauriello's thesis work since it was never presented to them. The Committee, however, was presented with Jansons' evaluation of Mauriello's work and did evaluate the import of her failure to maintain proper records of her research. Such considerations are clearly within the proper ambit of academic decisionmaking. See *Ewing*, 106 S.Ct. at 514.

While it is evident from the above discussion that Mauriello has failed to adduce any evidence that the decision to dismiss her was not a genuine academic decision under any standard of proof, it should be noted that the standard which she applies in her argument is not applicable to the instant matter. Petitioner contends that the very minimal *prima facie* standard applicable in employment discrimination cases should also apply to cases in which students challenge their academic dismissals

(Petition at page 9). See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). However, this Court has never applied that standard to student academic dismissals. Indeed, applying that very minimal standard is directly contrary to this Court's admonition in *Ewing* that "[c]onsiderations of profound importance counsel restrained judicial review of the substance of academic decisions." 106 S.Ct. at 513.

The fault in this case is not with the Circuit Court's opinion. Rather, the fault lies with the lack of any relevant evidence submitted by petitioner which could support a jury verdict of a substantive due process violation. As the court below correctly held, petitioner failed to adduce any evidence upon which a jury could properly find that the decision to dismiss her was "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Ewing, supra,* 106 S.Ct. at 513.

Finally, even if it can be argued that petitioner's contentions have any merit, it would not justify plenary review by this Court. The opinion of the Third Circuit Court of Appeals is clearly a correct interpretation of the governing law as enunciated by this Court. The very most that could be argued by petitioner is that the lower court improperly interpreted and applied the facts of this particular case. Such a contention, however, does not constitute a "special and important reason" for granting the writ, *Sup. Ct. R.* 17, particularly given the subsequent Ad Hoc Committee finding that petitioner's work was "not of good scientific quality and Ph.D. caliber" (Pa15).

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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